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No. 72-212

MICHAEL RODAK, JR.,

In The

# Supreme Court of the United States

OCTOBER TERM, 1972

HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,
*Petitioner*,

v.

DANIEL P. MURPHY,
*Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## BRIEF FOR RESPONDENT

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### QUESTION PRESENTED

Respondent believes petitioner's statement of the question presented is inaccurate and inadequate. It should be stated as:

> In what circumstances may the police or prosecutor involved in a case engage in self-help and dispense with the Fourth Amendment's requirement of a neutral and detached magistrate for arrests, searches and seizures?

## STATEMENT OF THE CASE

Respondent desires to add the following evidence:

The lacerations and abrasions on the throat of the deceased had been made by something sharp like a fingernail (Tr 21, A 41) (not by a fingernail). The son's fingernails had been bitten back so they were impossible to scrape (Tr 41, A 41). (There was nothing in the evidence as to when this had occurred.)

The respondent's refusal to take a polygraph test (Tr 66, A 64), his refusal to give fingernail scrapings and his refusal to discuss the case further on advice of his attorney, were in the minds of the police not the action of an innocent man (Tr 42, A 46).

The police would have thought of scraping respondent's fingernails without the dark spot (Tr 53, A 53; Tr 62, A 40), since he was a suspect (Tr 40, A 40), and they would have taken scrapings from any suspect (Tr 63, A 61).

Furthermore the police did not know what they would obtain until after the scrapings had been examined (Tr 62, A 60).

## ARGUMENT

Searches and seizures conducted outside the judicial process without prior approval by judge or magistrate are unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions. *Coolidge v. New Hampshire*, 403 US 443, 454-455 (1971).

So far, with the exception of automobiles poised for flight, searches and seizures without warrants have been held unlawful despite a showing of probable cause. *Katz v. United States*, 389 US 347, 357 (1967).

The searches and seizures otherwise authorized have been limited to absolute necessity, a search of a person lawfully arrested and his immediate area, primarily for weapons, *Chimel v. California*, 395 US 752, 763 (1969), or in hot pursuit of a fleeing felon, again primarily for weapons, *Warden v. Hayden*, 387 US 294, 298-299 (1967), or where the evidence is in the course of destruction, *Schmerber v. California*, 384 US 757, 770-771 (1966), or the pat-down for weapons by a field-interrogating policeman, *Terry v. Ohio*, 392 US 1, 29-30 (1968).

Of course in this case there was no search incident to a lawful arrest because such must be essentially contemporaneous, *Shipley v. California*, 395 US 818 (1969); *James v. Louisiana*, 382 US 36 (1965), and respondent here was not arrested until a month later (Tr 19, A 21). *Terry v. Ohio*, 392 US 1, 26 (1968).

Petitioner contends there was probable cause to arrest and, therefore, the lesser detention and consequent search and seizure should not be cause for complaint. Outside of a stormy marriage, hardly basis for a charge of murder, and a neat room which could have been arranged either before or after the killing (Tr 35-36, A 35-36), what established this probable cause? Even the police only referred to Murphy as a "suspect" (Tr 40, A 40), *Beck v. Ohio*, 397 US 89 (1964), and he appar-

ently was a suspect because he exercised his Fifth and Sixth Amendment rights which, to the policemen, was not the action of an innocent man (Tr 42, A 46). Surely this cannot be the basis for probable cause! *Griffin v. California*, 380 US 609 (1965).

Because the police may have lawfully occasioned some inconvenience to respondent is not a reason to allow additional unlawful intrusions. *Chimel v. California*, 395 US 752, 763 (1969).

Should Murphy be likened to the automobile "poised for flight"?

First, search of such automobile requires facts showing probable cause that the material sought is present. *Carroll v. United States*, 267 US 132, 162 (1925). Here the police had no idea what the scrapings would show until they had been examined in the laboratory (Tr 62, A 60).

Second, undersigned believes this theory allowing search of an automobile without warrant is obsolete under modern conditions of instant communication for obtaining warrants and stopping automobiles. *cf. Whitely v. Warden*, 401 US 560, 563 (1971).

This is especially so since detentions for various purposes such as obtaining warrants have been authorized. *United States v. Van Leeuwen*, 397 US 249 (1970); *Terry v. Ohio*, 392 US 1 (1968); *Morales v. New York*, 396 US 102 (1969).

Does the fact that the evidence might conceivably have been destroyed create an exception? It has not been

so held, *Vale v. Louisiana*, 399 US 30, 34 (1970), unless the evidence is in the course of destruction. *Schmerber v. California*, 384 US 757, 770-771 (1966). Here the respondent was at the police station under the supervision of police officers (Tr 32-33, A 33; Tr 38-39, A-38-39). *Preston v. United States*, 376 US 364, 368 (1963). Any attempt at spoliation would have been frustrated and the admissibility into evidence of such attempted spoliation would be more damning than the evidence itself. Furthermore, all evidence might conceivably be destroyed. Allowing search and seizure on this basis eliminates the Fourth Amendment altogether.

Petitioner rejects the application of *Davis v. Mississippi*, 394 US 721 (1969) on the basis that it involved a roundup of numerous persons. It does not lessen or increase the invasion of Murphy's rights because others may or may not have also suffered. *cf. United States v. Dionesio*,—US—(January 22, 1973).

Respectfully submitted,

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